

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

GLENN E. ELLIS,

Petitioner,

v.

ROBERT P. HOUSTON, Director
Nebraska Department of Correctional
Service, FRED BRITTEN, and JON
BRUNING, Atty. Gen.,

Respondents.

CASE NO. 4:12CV3206

MEMORANDUM
AND ORDER

The court has conducted an initial review of the Petition for Writ of Habeas Corpus (Filing No. 1) to determine whether the claims made by Petitioner are, when liberally construed, potentially cognizable in federal court. Petitioner has made three claims.

Condensed and summarized for clarity, the claims asserted by Petitioner are:

Claim One: Petitioner was denied due process of law and the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments *because* his trial and appellate counsel failed to (1) effectively investigate and gather evidence for Petitioner's case; (2) call witnesses and properly cross-examine witnesses; (3) make timely objections; (4) propose proper jury instructions including an instruction defining the terms in the amended information; (5) preserve issues for appeal; (6) advise Petitioner of his rights under the amended information; (7) file a timely motion in opposition to the prosecution's amended information; (8) raise issues on appeal, including counsel's own ineffective assistance; and (9) advise Petitioner during critical stages of his appeal.

Claim Two: Petitioner was denied the right to an impartial jury in violation of the Fifth, Sixth, and Fourteenth Amendments *because* (1) Petitioner was not initially allowed to be part of an ex parte communication between the court, the prosecution, trial counsel, and a juror; (2) trial counsel induced Petitioner to excuse a juror without cause and without informing Petitioner of

the consequences of that action; (3) the jury instruction did not distinguish between “serious bodily injury” and “serious bodily harm;” (4) during deliberations, the jury submitted a note to the trial judge asking the meaning of “serious bodily injury” and “serious bodily harm,” and the court incorrectly instructed the jury that the terms were synonymous; (5) the trial court rejected Petitioner’s request for a lesser offense instruction to the jury; and (6) one of the jurors waited until after submission of the verdict to express his/her concern of retaliation with regard to one of the State’s witnesses, Michael Bully.

Claim Three: Petitioner was denied due process of law in violation of the Fifth and Fourteenth Amendments *because* (1) the State amended its information to include a habitual criminal allegation for the purpose of inducing Petitioner to accept a plea bargain; and (2) the habitual criminal allegation was made without sufficient proof that Petitioner was the same person who had been convicted of those crimes.

Liberal construed, the court preliminarily decides that all of Petitioner’s claims are potentially cognizable in federal court. However, the court cautions that no determination has been made regarding the merits of these claims or any defenses thereto or whether there are procedural bars that will prevent Petitioner from obtaining the relief sought.

IT IS THEREFORE ORDERED that:

1. Upon initial review of the Petition (Filing No. [1](#)), the court preliminarily determines that Petitioner’s claims, as set forth in this Memorandum and Order, are potentially cognizable in federal court;
2. The Clerk of the court is directed to mail copies of this Memorandum and Order and the Petition to Respondents and the Nebraska Attorney General by regular first-class mail;
3. By December 14, 2012, Respondents shall file a motion for summary judgment or state court records in support of an answer. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: **December 14, 2012:** deadline for Respondents to file state court records in support of answer or motion for summary judgment;

4. If Respondents elect to file a motion for summary judgment, the following procedures shall be followed by Respondents and Petitioner:
 - A. The motion for summary judgment shall be accompanied by a separate brief, submitted at the time of the filing of the motion.
 - B. The motion for summary judgment shall be supported by such state court records as are necessary to support the motion. Those records shall be contained in a separate filing entitled: "Designation of State Court Records in Support of Motion for Summary Judgment."
 - C. Copies of the motion for summary judgment, the designation, including state court records, and Respondents' brief shall be served upon Petitioner *except* that Respondents are only required to provide Petitioner with a copy of the specific pages of the record which are cited in Respondents' brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
 - D. No later than 30 days following the filing of the motion for summary judgment, Petitioner shall file and serve a brief in opposition to the motion for summary judgment. Petitioner shall submit no other documents unless directed to do so by the court.
 - E. No later than 30 days after the filing of Petitioner's brief, Respondents shall file and serve a reply brief. In the event that Respondents elect not to file a reply brief, they should inform the court by filing a notice stating that they will not file a reply brief and that the motion is therefore fully submitted for decision.
 - F. If the motion for summary judgment is denied, Respondents shall file an answer, a designation and a brief that complies with terms of this order. (See the following paragraph.) The documents shall be filed no later than 30 days after the denial of the motion for summary judgment. **Respondents are warned that the failure to file an answer, a designation and a brief in a timely fashion may result in the imposition of sanctions, including the release of Petitioner;** and
5. If Respondents elect to file an answer, the following procedures shall be followed by Respondents and Petitioner:

- A. By **December 14, 2012**, Respondents shall file all state court records which are relevant to the cognizable claims. See, e.g., [Rule 5\(c\)-\(d\) of the Rules Governing Section 2254 Cases in the United States District Courts](#). Those records shall be contained in a separate filing entitled: "Designation of State Court Records In Support of Answer."
- B. No later than 30 days after the filing of the relevant state court records, Respondents shall file an answer. The answer shall be accompanied by a separate brief, submitted at the time of the filing of the answer. Both the answer and brief shall address all matters germane to the case including, but not limited to, the merits of Petitioner's allegations that have survived initial review, and whether any claim is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, a statute of limitations, or because the petition is an unauthorized second or successive petition. See, e.g., [Rules 5\(b\) and 9 of the Rules Governing Section 2254 Cases in the United States District Courts](#).
- C. Copies of the answer, the designation, and Respondents' brief shall be served upon Petitioner at the time they are filed with the court *except* that Respondents are only required to provide Petitioner with a copy of the specific pages of the designated record which are cited in Respondents' brief. In the event that the designation of state court records is deemed insufficient by Petitioner, Petitioner may file a motion with the court requesting additional documents. Such motion shall set forth the documents requested and the reasons the documents are relevant to the cognizable claims.
- D. No later than 30 days following the filing of Respondents' brief, Petitioner shall file and serve a brief in response. Petitioner shall submit no other documents unless directed to do so by the court.
- E. No later than 30 days after the filing of Petitioner's brief, Respondents shall file and serve a reply brief. In the event that Respondents elect not to file a reply brief, they should inform the court by filing a notice stating that they will not file a reply brief and that the merits of the petition are therefore fully submitted for decision.
- F. The Clerk of the court is directed to set a pro se case management deadline in this case using the following text: **January 14, 2013:** check for Respondents to file answer and separate brief.

6. No discovery shall be undertaken without leave of the court. See [Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts](#).

DATED this 31st day of October, 2012.

BY THE COURT:

s/Laurie Smith Camp
Chief United States District Judge

*This opinion may contain hyperlinks to other documents or Web sites. The U.S. District Court for the District of Nebraska does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.